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Dian Kiara Sdn Bhd v GCH Retail (M) Sdn Bhd

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HIGH COURT (KUCHING) — SUIT NO KCH-22NCvC-15/5 OF 2020
ZALEHA PANDIN JC
21 AUGUST 2020

C

Civil Procedure — Stay of proceedings — Defendant applied for plaintiff's action to stay and referred to arbitration — Plaintiff and defendant entered into lease agreement stipulated disputes to be referred to arbitration — Plaintiff contended defendant had taken steps into proceedings before referring to arbitration — Whether defendant's conduct was amounted to 'before any other steps in the proceedings' — Arbitration Act 2005 s 10

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By notice of application in encl 11, and pursuant to s 10 of the Arbitration Act 2005 ('the Act') the defendant applied for all further proceedings in the present action be stayed and be referred to arbitration; all further proceedings including the filing of the defence and the affidavit in reply to the plaintiff's affidavit in support be stayed pending the disposal of the present action and that cost of the present application be paid by the plaintiff to the defendant. The parties had entered into a lease agreement on 10 June 2010 whereby one of the condition in the agreement was for disputes to be referred to arbitration. The issue arose as to the meaning of 'before taking any other steps in the proceedings' as stated in s 10 of the Act. The plaintiff contended that the defendant had taken steps into the proceeding prior to referring the disputes to arbitration and that even before the filing of the present suit, the defendant's conduct by appointing Messrs Loke, King Goh & Partners Advocate to represent them in accepting service amounted to taking a step in the proceedings. Further, there was also a series of exchange of letters and Whatsapp between counsels and an e-review before the court whereby the defendant through his counsel had never once indicated that they would be filing for a stay, instead the defendant requested for extension of time which was acceded by the plaintiff.

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Held, allowing the defendant's application in encl 11 with costs of RM4,000:

(1) The defendant's conduct by appointing Messrs Loke, King Goh & Partners Advocate to represent them in accepting service could not be taking into account as it was prior to the actual filing of the present suit in court. The defendant's action could not be construed as taking a step in the proceeding stipulated under s 10 of the Act (see para 6).

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(2) Applying the principle in *Malaysian European Production System Sdn Bhd v Zurich Insurance (M) Bhd* [2003] 1 MLJ 304, the court was inclined to

agree with learned counsel for the defendant in that the defendant requested for extension of time did not amount to taking a step in the proceeding but indeed it was taking a step outside the proceeding altogether. It did not preclude the plaintiff from applying for a stay (see para 16).

(3) It was noted that there was no evidence that the plaintiff ever denied the existence of the arbitration clause in the lease agreement which was agreed by both parties when they entered into the lease agreement in 2010. All the defendant wanted was to apply for a stay to pursue the agreed recourse for arbitration regardless of the word 'may' which was used in the lease agreement. The word 'may' meant the discretion of either parties to invoke so long as notice is given to the other. Furthermore, it was considered view that the plaintiff never disputed nor challenged the arbitration clause found in the lease agreement. There was no evidence at all that it was null and void, inoperative and incapable of being performed. There were merits in the defendant's application (see para 17).

[Bahasa Malaysia summary

Berdasarkan kepada notis permohonan lampiran 11, dan menurut s 10 Akta Timbang Tara 2005 ('Akta tersebut') defendan memohon untuk kesemua proses selanjutnya dalam tindakan ini digantung dan dirujuk ke timbang tara; kesemua prosiding selanjutnya termasuk pemfailan pembelaan dan afidavit jawapan kepada afidavit sokongan plaintif digantung sementara menunggu tindakan semasa diputuskan dan kos permohonan semasa dibayar oleh plaintif kepada defendan. Pihak-pihak telah menandatangani perjanjian sewaan pada 10 Jun 2010 di mana salah satu syarat dalam perjanjian tersebut adalah agar sebarang pertikaian dirujuk kepada timbang tara. Isu timbul mengenai makna 'sebelum mengambil langkah lain dalam prosiding' seperti yang dinyatakan dalam s 10 Akta tersebut. Plaintif berpendapat bahawa defendan telah mengambil langkah ke prosiding sebelum merujuk pertikaian tersebut kepada timbang tara dan bahkan sebelum pemfailan tuntutan saman semasa, tindakan defendan dengan melantik Tetuan Loke, Raja Goh & Partner untuk mewakili mereka dalam menerima perkhidmatan adalah sebagai mengambil langkah dalam prosiding. Selanjutnya, terdapat juga beberapa pertukaran surat dan Whatsapp antara peguamcara dan *e-review* di mahkamah dimana defendan melalui peguamnya tidak pernah menunjukkan bahawa mereka akan memfailkan penggantungan, sebaliknya defendan memohon lanjutan masa yang dipersetujui oleh plaintif.

Diputuskan, membenarkan permohonan defendan dalam lampiran 11 dengan kos RM4,000:

(1) Tindakan defendan dengan melantik Tetuan Loke, Raja Goh & Partner untuk mewakili mereka dalam menerima perkhidmatan tidak dapat

diambilkira kerana ianya adalah sebelum pemfailan tuntutan saman semasa di mahkamah. Tindakan oleh defendan tidak dapat ditafsirkan sebagai mengambil langkah dalam prosiding seperti yang ditetapkan di bawah s 10 Akta tersebut (lihat perenggan 6).

(2) Dengan menerapkan prinsip dalam *Malaysian European Production System Sdn Bhd v Zurich Insurance (M) Bhd* [2003] 1 MLJ 304, mahkamah lebih cenderung untuk bersetuju dengan peguam yang bijaksana bagi defendan dalam hal tersebut oleh kerana defendan telah memohon lanjutan masa tidak terjumlah sebagai mengambil langkah dalam prosiding tetapi sebaliknya mengambil langkah luar daripada prosiding sama sekali. Itu tidak menghalang plaintif daripada memohon penggantungan (lihat perenggan 16).

(3) Ianya telah diketahui bahawa tidak ada bukti bahawa plaintif pernah menafikan wujudnya klausa timbang tara dalam perjanjian sewaan yang dipersetujui oleh kedua-dua pihak apabila mereka memasuki perjanjian sewaan pada tahun 2010. Apa yang dikehendaki oleh defendan adalah untuk memfailkan penggantungan untuk memohon haluan timbang tara seperti yang dipersetujui tanpa mengira perkataan 'boleh' yang digunakan dalam perjanjian sewaan. Perkataan 'boleh' bermaksud budi bicara mana-mana pihak untuk digunapkai selagi notis diberikan kepada pihak lain. Selanjutnya, ianya dianggap bahawa plaintif tidak pernah mempertikaikan atau mencabar klausa timbang tara yang terdapat dalam perjanjian sewaan. Tidak ada bukti sama sekali bahawa ia adalah batal dan tidak sah, tidak berfungsi dan tidak dapat dilaksanakan. Terdapat merit dalam permohonan defendan (lihat perenggan 17).]

Cases referred to

Binary Force Sdn Bhd v Lembaga Pelabuhan Johor [2009] MLJU 296; [2009] 1 LNS 313, HC (refd)

Brighton Marine Palace and Pier, Limited v Woodhouse [1893] 2 Ch 486, Ch D (refd)

CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd [2015] 11 MLJ 485; [2015] 1 LNS 149, HC (distd)

Malaysian European Production System Sdn Bhd v Zurich Insurance (M) Bhd [2003] 1 MLJ 304, HC (folld)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)

Parker, Gaines & Co, Limited v Turpin [1918] 1 KB 358 (distd)

Poh Thiam Seong & Anor v Ahmad Firdaus B Mohd Anuar [2020] MLJU 239; [2020] 1 LNS 262, HC (refd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625, FC (folld)

Winsin Enterprise Sdn Bhd v Oxford Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634, HC (distd)

Legislation referred to

Arbitration Act 2005 s 10
Rules of Court 2012 O 14
Rules of the High Court 1980 O 3 r 5

Leong Hsin Ru (Jacqueline Bong with her) (Tang & Partners) for the plaintiff. Liew Sheaw Kie (Loke, King, Goh & Partners) for the defendant.

Zaleha Pandin JC:

[1] By notice of application dated 8 July 2020 (encl 11), and pursuant to s 10 of the Arbitration Act 2005 the defendant applied for the following orders:

(a) that all further proceedings in this action be stayed and be referred to arbitration;

(b) that all further proceedings including the filing of the defence and the affidavit in reply to the plaintiff's affidavit in support affirmed by George Wong Kim Pau on 26 June 2020 pursuant to the plaintiff's notice of application dated 29 June 2020 be stayed pending the disposal of this action;

(c) that cost of this application be paid by the plaintiff to the defendant; and

(d) such further order and/or relief as this honourable court may deem fit and proper.

[2] The grounds of the application are that:

(a) the plaintiff's claim is premised on a lease agreement dated 6 October 2010. The lease agreement contains an arbitration clause;

(b) as such this proceedings ought to be stayed pending reference to arbitration pursuant to s 10 of the Arbitration Act 2005; and

(c) the affidavit of Jason Chong Veen Joo found at encl 12 listed mainly one main point being cl 14.11 of the lease agreement which provides as follows:

> The parties hereto agree that in the event of any dispute between the parties as to any of the provisions of this Agreement and/or in respect of any matter pertaining to or relating to this Agreement, the parties shall refer the dispute to the respective Chief Executive Officer ('CEO') of the parties. The respective CEO of the parties shall attempt to resolve the dispute within fourteen (14) days from the date of the referral of the dispute.
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> In the event that the respective CEO of the parties are unable to resolve the dispute by the expiry of the said fourteen (14) day period, then either party hereto may give written notice to the other party to refer the dispute to arbitration.

Any dispute referred to arbitration shall be governed by the Arbitration Act, 2005 of Malaysia and the arbitration shall be by a single arbitrator mutually agreed to by the parties and failing such mutual agreement, the single arbitrator shall be appointed by the Director of the Regional Centre of Kuala Lumpur and the place of arbitration shall be Kuala Lumpur Regional Centre for Arbitration. The Rules of Arbitration shall be the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration.

The decision of the arbitrator shall be final and binding on both parties and the parties waive to the extent permitted by law any rights to appeal or to review of such decision by any court of tribunal.

CHRONOLOGICAL EVENTS

[3] For ease of reference, below is the chronological events of the suit that relates to encl 11 only:

(a) 28 May 2020 — writ and statement of claim filed by plaintiff;

(b) 29 May 2020 — amended statement of claim;

(c) 15 June 2020 — affidavit of service served on the defendant's solicitor;

(d) 24 June 2020 — the defendant enter appearance;

(e) 27 June 2020 — at 12.09pm via WhatsApp, the defendant's advocate requested for extension of time to file defence and the plaintiff acceded;

(f) 29 June 2020 — notice of application O 14 (encl 7) filed by the plaintiff;

(g) 29 June 2020 — affidavit in support to support NOA (encl 8);

(h) 7 July 2020 — at 9.36am via WhatsApp, the defendant's advocate requested for extension of time from the plaintiff's advocate to file affidavit AIO to the plaintiff's application (encl 7) and was refused;

(i) 7 July 2020 — at 5.47pm, the defendant's advocate wrote to the plaintiff's advocate informing them that the defendant advocate was just given a copy of the lease agreement on 7 July 2020 and that the defendant asked their advocate to apply for a stay;

(j) 8 July 2020 — notice of application for stay pending arbitration filed by the defendant (encl 11);

(k) 8 July 2020 — the defendant filed certificate of urgency;

(l) 9 July 2020 — the defendant wrote to court asking for early hearing date;

(m) 9 July 2020 — affidavit in opposition filed by the plaintiff (encl 15);

(n) 10 July 2020 — the plaintiff filed written submission and bundle of authorities;

(o) 13 July 2020 — the defendant filed AIR (encl 18);

(p) 14 July 2020 — the defendant filed in written submission;

(q) 15 July 2020 — the defendant filed in bundle of authorities;

(r) 20 July 2020 — the plaintiff filed submission in reply and bundle of authorities 2;

(s) 21 July 2020 — the defendant filed submission in reply and bundle of authorities 2;

(t) 21 July 2020 — the defendant's note of clarification;

(u) 27 July 2020 — the plantiff's note of clarification; and

(v) 27 July 2020 — the plaintiff filed bundle of authorities 3.

THE LAW

[4] The parties in this case had entered into a lease agreement on 10 June 2010 whereby one of the condition in the agreement was for disputes to be referred to arbitration.

[5] Section 10 of the Arbitration Act 2005 provides:

> A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application *before taking any other steps in the proceedings*, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (Emphasis added.)

THE ISSUE: WHAT AMOUNTS TO 'TAKING A STEP IN THE PROCEEDING' UNDER S 10 OF THE ARBITRATION ACT 2005

The defendant's action prior to filing of this action by the plaintiff

[6] The plaintiff contends that the defendant has taken steps into the proceeding prior to referring the disputes to arbitration and that even before the filing of this suit, the defendant's conduct by appointing Messrs Loke, King Goh & Partners Advocate to represent them in accepting service amounts to taking a step in the proceedings. To my mind, it cannot be so taking into account it was prior to the actual filing of the present suit in court. Hence, the defendant's action cannot be construed as taking a step in the proceeding stipulated under s 10 of the Arbitration Act 2005. Furthermore, the affidavit in opposition filed by the plaintiff vide encl 15 and affirmed by George Wong Kim Pau specifically referred to the defendant's advocate's letter at exh GWKP3

which states clearly at the last para the followings 'Our Client's rights are reserved'. To my mind, this should mean something to the plaintiff from the very beginning.

Entry of appearance by the defendant

[7] The defendant entered appearance on 24 June 2020.

The principle laid down in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 is as follows:

> Therefore, the legal position in Malaysia may be neatly summarised as follows:
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> (a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;
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> (b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration; and
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> (c) if he has taken any other action in the proceedings (other than steps (a) or (b) above mentioned, the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

[8] Having said that, the above principle is applicable here, thus, entry of appearance is a non-issue which is acknowledged and accepted by the plaintiff.

Requesting for extension of time

[9] The counsel for the plaintiff submitted that there was also a series of exchange of letters/Whatsapp between counsels and an e-review before the court whereby the defendant through his counsel had never once indicated that they would be filing for a stay, instead the defendant requested for extension of time which was acceded by the plaintiff.

[10] The plaintiff's counsel submitted this amount to taking a step in the proceeding. Few authorities were cited by the plaintiff's counsel to substantiate their position namely the following cases *Winsin Enterprise Sdn Bhd v Oxford*

Talent (M) Sdn Bhd [2009] MLJU 286; [2010] 3 CLJ 634, *CLLS Power System Sdn Bhd v Sara Timur Sdn Bhd* [2015] 11 MLJ 485; [2015] 1 LNS 149 and *Parker, Gaines & Co, Limited v Turpin* [1918] 1 KB 358.

[11] To my mind, those cases are distinguishable in that in *Winsin* it was held the applicant who seeks to rely on the arbitration clause and stay of proceedings in court must make the application for a stay promptly. It is noted, unlike in *Winsin* the arbitration clause here is not in dispute. Going by the chronological of event at para 3 above, the defendant's counsel was only served with the lease agreement on 7 July 2020, and notice of application for a stay vide encl 11 was filed immediately on the next day. The plaintiff's counsel was informed in writing on 7 July 2020. In my view, there is definitely no element of delay in filing encl 11. In the light of the above, it would be absurd and illogical to expect encl 11 to be filed promptly after entry of appearance when the defendant's counsel only knew about it on 7 July 2020. Indeed, it is apparent encl 11 was filed by defendant's counsel immediately upon knowing of the arbitration clause, thus, there is no delay.

[12] Furthermore, vide encl 18, the defendant filed second affidavit in reply dated 13 July 2020 deposed and affirmed by one Jason Chong Veen Joo. In encl 18, Jason affirmed that the lease agreement was only served to the defendant's counsel on 7 July 2020. Having examined the evidence before the court, I found that the plaintiff did not rebut, contradict nor challenge encl 18 by way of an affidavit. It is trite that failure to rebut, contradict nor challenge the assertion upon a material issue by one party is usually treated as an admission by that party. Cases referred to are *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 and *Binary Force Sdn Bhd v Lembaga Pelabuhan Johor* [2009] MLJU 296; [2009] 1 LNS 313. These two cases were referred and followed in the recent case of *Poh Thiam Seong & Anor v Ahmad Firdaus B Mohd Anuar* [2020] MLJU 239; [2020] 1 LNS 262. Most importantly, the affidavit affirmed by Jason Chong at para 6 of encl 18 remains unrebutted and unchallenged. It is noted that the plaintiff had ample time to rebut, contradict and challenge the contents of encl 18 which the plaintiff failed to do. It is nonetheless admitted that the plaintiff submitted the issue in passing in their written submission which in my view is insufficient, at best, it is merely a statement from the Bar.

[13] Moving on to another case cited by the plaintiff; *CLLS* whereby the defendant was barred from applying for a stay proceeding after filing and serving a notice to produce documents referred to in the pleadings. This however did not happen in the instant case. Consequently, applying the principle in *Sanwell*, the defendant in the instant case has not filed any pleadings which might be construed as abandoning his right to apply for a stay. Similarly in *Parker, Gaines & Co* the defendant has gone to the discovery stage

thus abandoning his right to apply for a stay.

[14] In fairness, the factual matrix of the case should be taken into account. In *Malaysian European Production System Sdn Bhd v Zurich Insurance (M) Bhd* [2003] 1 MLJ 304, RK Nathan J highlighted that O 3 r 5 provides for consent by letter without taking any steps in the proceedings His Lordship further said as follows:

> Since sub-r (3) provides for written consent by a letter without the need for an order of court, I hold that having given the written consent, the plaintiff cannot now seek to argue that the granting of the consent must be held against the defendant. Of course, the application by the letter dated 16 February 2001 was made under sub-r (3) which provides for the enlargement of time without taking any step in the proceedings. It is clear the very objective of sub-r (3) is to enable the parties to enlarge time by consent without the need to apply to court and thus taking a step in the proceedings. However, if the plaintiff had refused the application for extension of time then the defendant would have been compelled to apply to court and this would be tantamount to taking a step in the proceedings. This view becomes all the more clear in the Federal Court's reference to the case of *Ford's Hotel Co v Bartlett* [1896] AC 1. In *Ford's Hotel Co*, the House of Lords held that when a defendant took out a summons for obtained an order for further time to deliver his defence, he is deemed to have taken a step in the proceedings within the meaning of the Act and was not afterwards entitled to apply for a stay in the ground that the proceedings were brought in respect of a matter agreed to be referred to arbitration.
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> In the circumstances, it is my judgment that since the plaintiff had consented to the defendant's request for extension of time and since the application for a stay of proceedings was filed before the next return date and the plaintiff was has indeed served the summons as early as on 11 Jun 2002 on the defendant personally, had failed to take judgment on 17 July 2002 or the next return date, the defendant had not, by merely writing the letter dated 16 February 2002, taken any steps in the proceedings within the meaning of s 6 of the Act.

[15] Further, the subsequent actions taken by the defendant's counsel can be seen at para 3(k) and (l) of the chronological events which demonstrated and supported the defendant's determination to have the matter stayed.

[16] Applying the principle in *Malaysian European Production System* case, I am inclined to agree with the learned counsel for the defendant in that the defendant request for extension of time does not amount to taking a step in the proceeding but indeed it is taking a step outside the proceeding altogether (see *Brighton Marine Palace and Pier, Limited v Woodhouse* [1893] 2 Ch 486). This does not preclude the plaintiff from applying for a stay.

[17] In completeness, it is noted that there is no evidence that the plaintiff ever denied the existence of the arbitration clause in the lease agreement which was agreed by both parties when they entered into the lease agreement in 2010.

To my mind, all the defendant wants is to apply for a stay to pursue the agreed recourse for arbitration regardless of the word 'may' which is used in the lease agreement. The word 'may' means the discretion of either parties to invoke so long as notice is given to the other. Furthermore, it is my considered view that the plaintiff never disputed nor challenged the arbitration clause found in the lease agreement. There is no evidence at all that it is null and void, inoperative and incapable of being performed.

CONCLUSION

[18] For all the aforesaid reasons, I find merits in the defendant's application and allowed encl 11 with costs of RM4,000 against the plaintiff.

Application in encl 11 allowed with costs of RM4,000.

Reported by Mohd Kamarul Anwar